



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

OFFICE OF THE
REGIONAL ADMINISTRATOR

September 26, 1995

Mr. John Caffrey
Chairman
State Water Resources Control Board
State of California
901 P Street
P.O. Box 100
Sacramento, California 95812-0100

Dear Mr. Caffrey:

I am writing to inform you of the U.S. Environmental Protection Agency's (EPA's) action on the revised Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995 Bay/Delta Plan). The 1995 Bay/Delta Plan was adopted by the State Water Resources Control Board (State Board) in State Board Resolution No. 95-24 on May 22, 1995, approved by the California Office of Administrative Law on July 17, 1995, and submitted to EPA for approval on July 28, 1995.

SUMMARY

I appreciate the State Board's strong commitment to the collaborative process that led to the Bay/Delta Accord in December 1994, and your timely adoption of the 1995 Bay/Delta Plan. After substantial and careful review by my staff, I am pleased to inform you that EPA is approving the 1995 Bay/Delta Plan as meeting the requirements of Section 303(c) of the Clean Water Act. This action is based upon my determination that the 1995 Bay/Delta Plan will protect the designated uses of the Bay and Delta and otherwise complies with the requirements of the Clean Water Act.¹

¹Consistent with our past practice in California, this action pertains only to those parameters covered in the 1995 Bay/Delta Plan, and this approval does not affect the status of related California water quality control plans applicable to the waters of the Bay/Delta. In addition, and again consistent with our past practice, EPA is treating the 1995 Bay/Delta Plan's "beneficial uses" and "objectives" as "designated uses" and "criteria," respectively, for all purposes under the Clean Water Act.

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EPA'S REVIEW OF STANDARDS

As you know, under Section 303 of the federal Clean Water Act and EPA's implementing regulations, states are to establish designated uses for waterbodies, and must adopt water quality criteria sufficient to protect those designated uses. EPA is to review and approve or disapprove all state-adopted water quality standards. In reviewing water quality criteria, EPA considers whether the criteria contain sufficient parameters to protect the designated uses.

My action today resolves longstanding issues involving water quality concerns in the Bay/Delta. As you know, in September 1991, EPA disapproved part of the State Board's 1991 Water Quality Control Plan, finding that the State had not "adopted criteria sufficient to protect the designated uses" of the estuary. As required under the Clean Water Act, following its disapproval of the State's plan, EPA prepared federal criteria replacing the disapproved State plan. These federal criteria were proposed in December 1993 (59 F.R. 810 (January 6, 1994) and promulgated in December 1994 (60 F.R. 4664 (January 24, 1995).

At the same time, however, EPA, the State Board, and the other federal and State agencies involved in the Bay/Delta continued pursuing a coordinated approach to protecting the fish and wildlife resources of the estuary. These cooperative efforts yielded results first in the Framework Agreement signed by federal and State agencies in the summer of 1994. This Framework Agreement established a process through which the government agencies would develop approvable water quality standards, coordinate water project operations, and develop long-term solutions to Delta water quality and management issues. Perhaps more important, this cooperative process led to the signing of the Bay/Delta Accord on December 15, 1994. This truly historic agreement between the State, the federal government, and representatives of the major stakeholder groups concerned with the uses of the Bay/Delta included agreements on a broad range of issues. Notably, the Bay/Delta Accord presented an outline of water quality measures that, if put into effect by the State Board following its required process, would serve as the basis for water quality protection in the Bay/Delta during the current triennial review period.

EPA commends the State Board for its efforts in moving forward and following through on the Bay/Delta Accord, and in developing the 1995 Bay/Delta Plan. Based on our technical review of the plan,² EPA has concluded that the 1995 Bay/Delta Plan meets the requirements of Section 303 of the Clean Water Act and of EPA's implementing regulations at 40 CFR §§ 131.5 and 131.6.

²A copy of the EPA technical support document is being sent to you under separate cover.

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EPA is including as Attachment 1 a brief summary of some of the major assumptions we made in reviewing the 1995 Bay/Delta Plan. Also included is a discussion of the new data and information that should be collected as the Plan is implemented, and which should be considered during the next triennial review. As correctly noted in the 1995 Bay/Delta Plan, and as acknowledged by all parties to the Bay/Delta Accord, the protective measures being implemented in the 1995 Bay/Delta Plan need careful review as new information is developed about the estuary. EPA is committed to working with the State Board, other State and federal agencies, and the various stakeholders during the next few years as these protective measures are evaluated and adjusted to assure protection of the Bay/Delta's natural resources.

As we agreed in the Framework Agreement and Bay/Delta Accord, EPA is also committed to withdrawing the federal water quality standards for the Bay/Delta promulgated on December 15, 1994. However, as we have discussed with you and your staff, we are concerned about the potential impact of pending state litigation challenging the state standards, and about the impact of potential budgetary actions at the federal level. We think it in everyone's best interests to avoid a troubling situation similar to one that arose when a state court invalidated the State Board's newly-adopted toxic pollutant water quality objectives in the state's Inland Surface Water and Enclosed Bays and Estuaries Plans. As you know, the state court's action resulted in there being neither state nor federal numerical toxic criteria applicable to the relevant waterbodies. As a result, EPA is now preparing a comprehensive federal toxics rule for California under the Clean Water Act.

During the next month, we would like to further discuss our options with you and the other state and federal agencies and stakeholder groups. These options may include issuing a temporary stay of the federal rule, and/or withdrawing the federal rule pending resolution of the state litigation. We also intend to place this issue on the agenda for the October CAL-FED meetings, and are hopeful that we can reach agreement on a process that satisfies our commitments while assuring that protective standards remain in place for the Bay/Delta.

CONCLUSION

Thank you again for your leadership in making the Bay/Delta Accord a reality. I look forward to continuing to work with you and your staff on the challenging task of protecting one of California's most precious natural resources.

Yours,



Felicia Marcus
Regional Administrator

Enclosures

ATTACHMENT 1

In this attachment, EPA is highlighting certain assumptions and conclusions it made during its evaluation of the 1995 Bay/Delta Plan. To ensure that the designated uses of the estuary are protected, and that Bay/Delta Accord is fully implemented, data concerning these assumptions and conclusions should be collected during implementation of the Plan, and this data should be considered during the next triennial review of the State's plan.

(1) Effect of New Delta Configurations

EPA's evaluation of the estuarine habitat measures included in the 1995 Bay/Delta Plan relied on the expected effect of those measures on the position of the 2 ppt isohaline during the critical spring runoff period. In modeling this expected effect, the DWRSIM model assumed certain baseline conditions, and also assumed the present delta configuration. If those baseline conditions change, or if the configuration of the delta changes due to changes in the location or operation of delta control and export facilities, the estuarine habitat measures must be reviewed to assure that the designated estuarine habitat uses are still receiving protection.

(2) Operations of the Delta Cross Channel and Old River Barrier

As explained in more detail in the preamble to EPA's final criteria, EPA believes that it will be extremely difficult to attain protection of the cold water fish migration designated use unless the Delta Cross Channel is closed during the migration period and the Old River barrier is in place. The State Board agrees, in that the 1995 Bay/Delta Plan mandates closure of the Delta Cross Channel and strongly urges the responsible agencies to pursue a barrier at the head of Old River on the San Joaquin. Failure to implement either of these operational measures will, in EPA's opinion, have serious adverse impacts to protection of the fish migration designated use.

(3) Need for Numeric Criteria in Suisun Marsh

EPA agrees with the State Board that numeric criteria protecting the tidal portion of the Suisun Marsh should be developed as soon as possible. EPA believes that the studies currently underway, including those cited by the State Board in its 1995 Bay/Delta Plan, should provide sufficient information so that scientifically-justified numeric criteria can be adopted during the next triennial review.

(4) Legal Issues

EPA recognizes that there is a difference in opinion about the scope of EPA's authority under the Clean Water Act to review and/or to promulgate certain measures included in the 1995 Bay/Delta Plan. EPA further recognizes that the State Board has explicitly reserved its arguments on these issues. See 1995 Bay/Delta Plan at pp. 10-11. For the reasons outlined in its preambles to the proposed and final federal rule, as well as in its response to comments received during the public comment period, EPA believes that its review of the 1991 and 1995 Bay/Delta Plans and its promulgation of the criteria included in its final rule are fully in accord with the Clean Water Act. EPA also reserves its arguments as to these issues.

(5) Category III Measures

A significant component of the Bay/Delta Accord signed in December 1994 was the commitment to develop and fund programs and activities addressing non-flow parameters affecting the designated uses in the Bay/Delta. EPA shares the concern of the State Board that these programs and activities need to be carried out expeditiously, so that the benefits of these measures can be achieved. Without successful implementation of the Category III program, EPA is concerned that the expected level of protection for the resources envisioned in the Accord and in the State's 1995 Bay/Delta Plan will not be achieved.

In its review of the 1995 Bay/Delta Plan, EPA has not assumed that any particular programs from the Category III process have been implemented. However, during the next triennial review, we believe that the State Board should factor the success or lack of success of the Category III programs into its assessment of whether the 1995 Bay/Delta Plan is adequate to protect the designated uses of the estuary, and to take appropriate steps to ensure that the expected level of protection is achieved.